(Submitted With the Consent of the Parties)
No. 85-1973 (6)

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD POPE AND CHARLES G. MORRISON,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

BRIEF IN SUPPORT OF PETITIONERS OF VOLUNTEER LAWYERS FOR THE ARTS, INC., AS AMICUS CURIAE

IRWIN KARP*
40 Woodland Drive
Port Chester, New York 10573
(914) 939-5386
Attorney for Amicus Curiae Volunteer Lawyers for the Arts, Inc.

Of Counsel:
I. FRED KOENIGSBERG
HARRIETTE K. DORSEN

November 20, 1986
*Counsel of Record

11pp

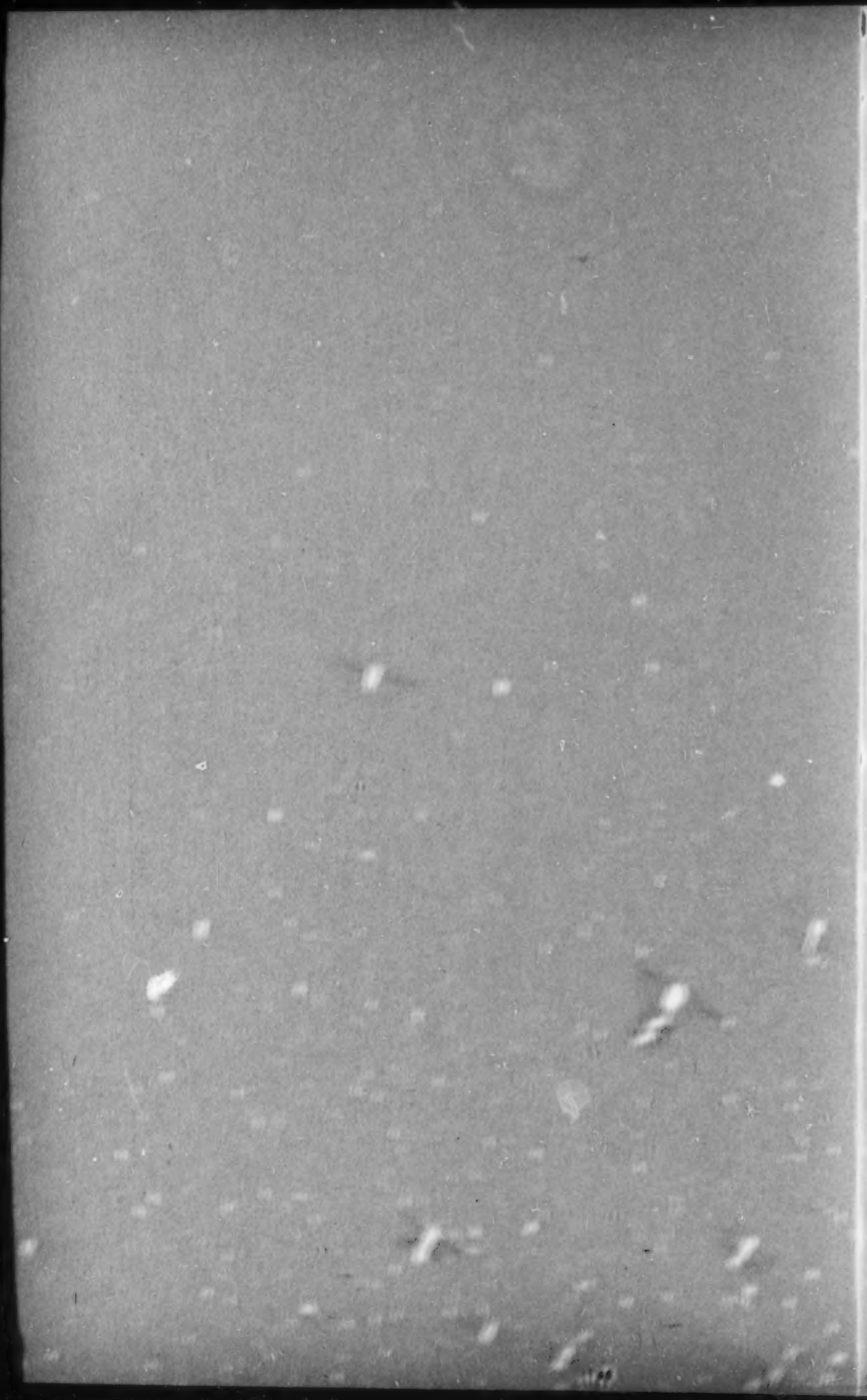

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. *Miller* Mandates an Objective "Value" Test	2
II. Subsequent Decisions	3
III. The First Amendment Requires an Objective "Value" Test	4
CONCLUSION	7

AUTHORITIES CITED

	Page
Bantam Books v. Sullivan, 372 U.S. 58 (1963) ...	6
Greenberg v. Bolger, 497 F. Supp. 756 (E.D.N.Y. 1980)	4
Hamling v. United States, 418 U.S. 87 (1974)	4
Lamont v. Postmaster General, 381 U.S. 301 (1965)	6
Miller v. California, 413 U.S. 15 (1973)	1, 2, 3, 5
New York Times v. Sullivan, 376 U.S. 254 (1964)	5
Penthouse Intern Ltd. v. McAuliffe, 610 F.2d 1354 (55th Cir. 1980)	3
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972)	4
Red Lion Broadcasting Company, Inc. v. FCC 395 U.S. 367 (1969)	6
Smith v. California, 361 U.S. 147 (1959)	6
Smith v. United States, 431 U.S. 291 (1977)	2, 3, 4
Stanley v. Georgia, 394 U.S. 557 (1969)	6
United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982)	3
United States v. Heyman, 562 F.2d 316 (4th Cir. 1977)	3
Wooley v. Maynard, 430 U.S. 705 (1977)	4
Young v. American Mini Theatres, 427 U.S. 50 (1975)	4

No. 85-1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD POPE AND CHARLES G. MORRISON,

Petitioners,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

BRIEF IN SUPPORT OF PETITIONERS VOLUNTEER LAWYERS FOR THE ARTS, INC., AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

Volunteer Lawyers for the Arts, Inc. ("VLA") is a not-for-profit organization which provides legal services and advice to many authors, artists and dramatists with respect to their contracts, copyrights and other matters, including their rights of free expression under the First Amendment.

Determination of the issue presented on this appeal may seriously affect those First Amendment rights. If the Court does not rule that the "significant value" test of *Miller v. California*,

413 U.S. 15, 24-25 (1973), must be judged on an objective basis and not by contemporary community standards, then many books, paintings, plays and other works of recognized literary, artistic, political or scientific value may be held obscene, or subjected to obscenity prosecutions that otherwise would not have been instituted.

Because the First Amendment rights of authors and artists it advises and assists may be affected by the Court's decision, VLA submits this brief amicus curiae, with the consent of the parties, urging that the court reverse the Illinois Appellate Court's decision that a work's significant value must be determined under contemporary community standards.

SUMMARY OF ARGUMENT

The Court's opinion in *Miller v. California* makes it plain that the "value" prong of its 3-part standard for defining obscenity shall be judged solely on an objective basis ("value" refers to literary, artistic, political or scientific value). Subsequent cases correctly held that the "value" of books at issue could not be determined by applying contemporary community standards. We also submit that the use of contemporary community standards to determine "value" would frustrate the First Amendment's fundamental purpose, sanctioning and stimulating suppression of works of significant "value" that are entitled to its protection.

ARGUMENT

I. Miller *Mandates an Objective "Value" Test*

In *Smith v. United States*, 431 U.S. 291 (1977), the Court stressed that the very language of the *Miller* test makes it "clear that contemporary community standards" apply only to the "prurient interest" prong, and that the *Miller* opinion "indicates that patent offensiveness is to be treated in the same way." 431 U.S. at 300-301.

The *Smith* opinion then reminds us that "Literary, artistic, political or scientific value is not discussed in *Miller* in terms of

contemporary community standards." *Id.* These statements leave no doubt that contemporary community standards were not to determine whether the book, painting or other work in the dock had significant literary, artistic, political or scientific value. If the Court had intended those standards be used to judge "value," it would have said so in *Miller*, or subsequently in *Smith*. Pointedly, it did not.

Indeed, *Smith* referred to the safeguards against a jury's misuse of community standards in determining if a work "fell within the substantive limitations suggested in *Miller*," and then stressed that in addition, "The work also must lack serious literary, artistic, political or scientific value before a conviction will be upheld; this determination is particularly amenable to appellate review," 431 U.S. at 305.

II. *Subsequent Decisions*

U.S. Courts of Appeal correctly have held that, under *Miller v. California*, contemporary community standards cannot be used to determine whether the accused work has significant "value".

In *United States v. Heyman*, 562 F.2d. 316 (4th Cir. 1977) the Court reversed a conviction because the District Court erroneously instructed the jury to apply contemporary community standards in determining if the accused work had significant "value"; the Court of Appeals said "Nowhere does the (*Miller*) opinion suggest that the scientific value of sexually oriented expression be adjudged on such a parochial basis." (316 F.2d at 318.) See also: *United States v. Bagnall*, 679 F.2d 826, 835 (11th Cir. 1982) (citing *Smith*); and *Penthouse Intern, Ltd. v. McAuliffe*, 610 F.2d 1354 (5th Cir. 1980) ["The first and second prongs of the Miller test apply contemporary community standards to questions of fact such as 'appeal to the prurient interest' and 'patent offensiveness.' (citing *Smith*). Contemporary community standards are not applied to the third prong of the *Miller* test. *Id.*" 610 F2d at 1363.

III. *The First Amendment Requires an Objective "Value" Test*

(1) The "value" prong of the Miller test recognizes that the First Amendment shields works of significant literary, artistic, political or scientific value from suppression under state or federal obscenity statutes. That constitutional protection would be frustrated if determinations of "value" were made according to contemporary community standards rather than on an objective basis.

Indeed, use of a contemporary community standard to determine the worth of a book or play or painting is repugnant to the First Amendment since "Protection of unpopular ideas is the very essence of the First Amendment." *Greenberg v. Bolger*, 497 F. Supp. 756 (E.D.N.Y. 1980). Chief Judge Weinstein's statement is well-grounded on the Court's decisions. *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977) ["The First Amendment protects the right of individuals to hold views different from the majority," at 715]; *Young v. American Mini Theatres*, 427 U.S. 50 (1975) [Speech may not "be curtailed because it invites dispute . . . or even stirs people to anger (citation omitted)," at 64]; *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

While protection of "unpopular" and "minority" views is the "very essence" of the First Amendment, the essence of the "contemporary community standard" is just the opposite — to enforce the majority (the "popular") view that a work shall not be distributed or exhibited to those in the minority who wish to read or view it. In applying the community standard, jurors are supposed to draw on their "own knowledge of the views of the average person in the community," *Smith v. United States*, 431 U.S. 291, 302 (quoting *Hamling v. United States*, 418 U.S. 87, 104-105 (1974)).

Thus, if the significant value test were applied under the contemporary community standard, books, paintings, films and other works of objectively significant value could be suppressed in a community if a majority of its citizens — represented by 12 of their number, applying the majority's view — judged the work lacking in "significant value." This suppression could

occur no matter how unqualified their judgment, and despite the fact that a minority held the view that the work had significant value.

It is characteristic of significant works of literature and art that often they are not read or understood by a majority in many communitites. If the third prong of the *Miller* test were made to depend on the majority's view, it would utterly fail to preserve the First Amendment protection to which creative works of significant value are entitled, even though they are unpopular to a community's majority.

No less than in the case of libel, suppression of constitutionally protected speech dealing with sexual themes is accomplished as much by the threat of prosecution and by the burden of defending against unwarranted prosecution, as it is by the fear of ultimate conviction. *Cf.*, *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964). Indeed, the threat of censorship to – and self-censorship by – book stores, libraries, museums, schools, and motion picture theatres, is even greater, since they often cannot afford the burden or the stigma of defending the sale, exhibition or distribution of a given work that they correctly believe is, objectively, of significant literary or artistic value. Even though reputable critics, scholars, educators, or other qualified commentators recognize that the work has significant "value", the use of a contemporary community standard to determine its value would make the risk of conviction too great.

The possibility of reversal on appeal offers little comfort to a book store or school that cannot afford a trial, no less the appeal. Perhaps the most inhibiting effect of a community-standard test of value would be to increase the risk of prosecution in communities with little tolerance and low regard for the literary or artistic value of books or paintings or films that deal with sexual themes.

(2) It must be emphasized that the First Amendment interests at stake here transcend those of the author, artist or other creator of a challenged work, and of the publisher or film company that distributes it. At stake, too, are the rights of schools,

book stores, museums, libraries and theatres in a given community to disseminate or exhibit the work if it is not constitutionally obscene – rights fully protected by the First Amendment. *Smith v. California*, 361 U.S. 147 (1959); *Bantam Books v. Sullivan*, 371 U.S. 58 (1963).

Also at stake are the rights of adults in the countless communities of the United States who choose to read books, view motion pictures and see works of art dealing with sexual themes which qualified experts believe to have significant literary or artistic or scientific value. The right of a minority in any community to obtain and have access to those works in the community also is encompassed in the First Amendment. That right is violated when the majority's view that such a work lacks significant value is allowed to sustain a restraint on its distribution. *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Stanley v. Georgia*, 394 U.S. 557 (1969) ["It is now well established that the Constitution protects the right to receive information . . . freedom of [speech and press] necessarily protects the right to receive. (citations omitted)", at 564.]; *Red Lion Broadcasting Company, Inc. v. FCC*, 395 U.S. 367 (1969) ["It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences, which is crucial here. That right may not be constitutionally abridged by Congress or by the FCC," at 390.]

We respectfully submit it is constitutionally impermissable to employ the community-interest standard to determine whether books, paintings, films and other works are so lacking in literary, artistic, political or social value as to be denied First Amendment protection against obscenity prosecutions, and banned from distribution or exhibition to adults who choose to read or view them, even when not disseminated to children or obtrusively exposed to unconsenting adults.

At the very minimum, we submit, the Amendment requires that this crucial determination as to significant value be made on an objective basis, relying on informed and qualified literary, artistic or scientific judgment.

CONCLUSION

It is respectfully submitted that the order appealed from should be reversed.

Respectfully submitted,

IRWIN KARP *(Counsel of Record)*
40 Woodland Drive
Port Chester, New York 10573
(914-939-5386)

Attorney for Volunteer Lawyers
for the Arts, Inc.
Amicus Curiae

Of Counsel:
I. FRED KOENIGSBERG
HARRIETTE K. DORSEN

November 20, 1986

CERTIFICATE OF SERVICE

I. Fred Koenigsberg, a member of the bar of the United States Supreme Court and attorney for Volunteer Lawyers for the Arts, Inc., hereby certifies, that on November 20, 1986 he served the foregoing brief *amicus curiae* of Volunteer Lawyers for the Arts, Inc. on the attorneys for the parties by mailing copies thereof to them at the following addresses:

GLENN A. STANKO, ESQ.
J. STEVEN BECKETT, ESQ.
RENO, O'BYRNE & KEPLEY, P.C.
501 West Church Street
Champaign, Illinois 61820
Attorneys for Petitioners

JACK DONATELLI, ESQ.
ASSISTANT ATTORNEY GENERAL, STATE OF ILLINOIS
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
Attorney for Respondent

New York, New York
November 20, 1986

s/I. Fred Koenigsberg

I. FRED KOENIGSBERG
Sixth Floor
One Lincoln Plaza
New York, New York 10023
(212)870-7513